

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ANNIE FORESTIER, guardian of Ermine  
Forestier; and ERMINE FORESTIER,

Plaintiffs,

v.

THE CITY OF VANCOUVER, a  
municipality; and AMY OLIVER and  
DUSTIN OLIVER, and their marital  
community,

Defendants.

Case No. C05-5042 RBL

ORDER

THIS MATTER comes on before the above-entitled Court upon Plaintiffs' Motion for Partial Summary Judgment Striking City of Vancouver's Affirmative Defense Claiming an Offset for Government Benefits [Dkt. #30] and Defendant City of Vancouver's Motion to File Second Amended Answer and Affirmative Defenses [Dkt. #32].

Having considered the entirety of the records and file herein, and having considered that oral argument is not necessary, the Court rules as follows:

This case involves a pedestrian, Ermine Forestier, who while crossing Fort Vancouver Way, in Vancouver, Washington, was struck by a vehicle driven by defendant Amy Oliver. Plaintiffs allege that the multiple brain, orthopedic and internal injuries sustained by Ms. Forestier resulted from the City of Vancouver's negligent design of the roadway and from the negligent operation of a vehicle by Mrs. Oliver.

Plaintiffs seek partial summary judgment dismissing Vancouver's Sixth Affirmative Defense of Offset

1 for Government Benefits pled in its First Amended Answer and Affirmative Defenses [Dkt. #24]. Plaintiffs  
2 argue that this defense is precluded by the collateral source rule. In response to plaintiffs' motion, Vancouver  
3 filed a separate motion to amend its answer striking the affirmative defense, and argues in opposition to  
4 plaintiffs' motion for summary judgment that the motion should be denied as moot. Plaintiffs oppose the  
5 motion to amend arguing that the proposed Second Amended Answer does not comport with Fed. R. Civ. P.  
6 8's directive that "[d]enials shall fairly meet the substance of the averments denied." Fed. R. Civ. P. 8(b).  
7 Plaintiffs also dispute the legal viability of Vancouver's proposed First Affirmative Defense of Implied Primary  
8 Assumption of Risk. Plaintiffs further contend that their motion for summary judgment is not moot because  
9 issues touching upon the collateral source rule could possibly occur at trial, and, as such, this Court should rule  
10 now that any potential evidence of funds from a collateral source will be excluded.

11 Motions to amend "shall be freely" granted, Fed. R. Civ. P. 15(a), and should be denied only for undue  
12 delay, bad faith or dilatory motive, futility of amendment or prejudice to the opposing party. *See Foman v.*  
13 *Davis*, 371 U.S. 178, 182 (1962). Vancouver's proposed Second Amended Answer and Affirmative Defenses  
14 strikes an affirmative defense to which plaintiffs have objected. Although the specific averments and denials  
15 in Vancouver's proposed amended answer do not track word for word the allegations in the complaint, the  
16 proposed answer clearly joins the issues and clearly sets forth Vancouver's position as to the facts and  
17 allegations pled by plaintiffs. Furthermore, at this stage in the proceeding, the Court is not prepared to make  
18 broad and potentially far-reaching evidentiary rulings without the benefit of more information on the specific  
19 evidence proposed to be introduced and the theory of its admissibility. Therefore, Vancouver's amended  
20 answer will not cause undue delay, is not offered in bad faith or for a dilatory motive, is not futile and does not  
21 prejudice the plaintiffs. It will be granted. Plaintiffs' motion for partial summary judgment will be denied  
22 because plaintiffs have obtained some of the relief they seek by this Court's granting of Vancouver's motion  
23 to amend, and the remainder of relief they seek is not yet ripe for ruling by the Court. It is hereby

24 **ORDERED** that Plaintiffs' Motion for Partial Summary Judgment Striking City of Vancouver's  
25 Affirmative Defense Claiming an Offset for Government Benefits [Dkt. #30] is **DENIED**. It is further  
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27  
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1       **ORDERED** that Defendant City of Vancouver's Motion to File Second Amended Answer and  
2 Affirmative Defenses [Dkt. #32] is **GRANTED**. Vancouver shall electronically file its Second Amended  
3 Answer and Affirmative Defenses within ten (10) days of entry of this Order.

4               The Clerk shall send uncertified copies of this order to all counsel of record, and to any party  
5 appearing pro se.

6               Dated this 20<sup>th</sup> day of September, 2006.

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9                               RONALD B. LEIGHTON  
UNITED STATES DISTRICT JUDGE